No. 82-1922

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In the Supreme Court of the United States

OCTOBER TERM, 1984

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether collective intrastate rate agreements among private motor carriers, which are permitted but not compelled by state law, constitute "state action" and therefore are not subject to the Sherman Act's prohibition against price fixing.

2. Whether the *Noerr-Pennington* doctrine immunizes collective intrastate rate agreements from the Sherman Act because the privately agreed-upon rates are subsequently submitted to state regulatory authorities.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 63a-93a) is reported at 702 F.2d 532. The panel opinion of the court of appeals (Pet. App. 31a-60a) is reported at 672 F.2d 469. The opinion of the district court (Pet. App. 1a-30a) is reported at 467 F. Supp. 471. The judgment entered by the district court (J.A. 93-102) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1983. The petition for a writ of certiorari was filed on May 27, 1983, and granted on

June 11, 1984. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant statutes as amended to date are set forth in the appendix to the brief of petitioner Southern Motor Carriers Rate Conference (Br. App. 1a-16a).

STATEMENT

1. Petitioners Southern Motor Carriers Rate Conference, Inc. (SMCRC) and North Carolina Motor Carriers Association, Inc. (NCMCA) are motor carrier rate bureaus.[1] These rate bureaus provide a forum in which competing member carriers discuss and agree on intrastate motor carrier rates, which are then submitted to state public service commissions for their approval. Pet. App. 7a-8a; 63a-64a.[2]

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[1] A third rate bureau, the Motor Carriers Traffic Association (MCTA), was also a defendant in this suit in the district court. MCTA did not, however, appeal from the district court's entry of an injunction against it. See pages 6-7, *infra*.

[2] SMCRC performs rate bureau functions with respect to intrastate motor common carrier rates for the transportation of general commodities within the States of Georgia, Mississippi, North Carolina and Tennessee (R. 81, 129). ("R." refers to the record in the district court. Where the reference is to the entire docket item, the page number given refers to the first page of the item.) There is a separate rate committee for each state (R. 1279). NCMCA performs the same functions in North Carolina (R. 68, 130). There is cooperation and coordination between the two rate bureaus in North Carolina (Pet. App. 8a).

SMCRC also acts as a rate bureau for interstate rates under agreements approved by the Interstate Commerce Commission (see 49 U.S.C. 10706(b)). R. 40, 82-83. The ICC's jurisdiction over motor common carrier transportation services and

The bureaus also perform other functions; they publish tariffs and supplements containing the rates agreed upon, and they provide counsel, staff experts and facilities for the preparation of cost studies and other types of exhibits and testimony for use in support of proposed rates at state regulatory commission hearings. Pet. App. 64a.

In November 1976, the United States filed a complaint against petitioners in the United States District Court for the Northern District of Georgia pursuant to Section 4 of the Sherman Act, 15 U.S.C. 4, alleging that petitioners' collective ratemaking operations constituted price fixing in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and seeking an injunction against the collective ratemaking practices. J.A. 1-14. Specifically, the complaint charged that the rate bureaus and their members were engaged in a conspiracy "[b]eginning sometime in the early 1940's * * * and continuing to the date of this Complaint" (J.A. 9), to "fix * * * rates charged for intrastate for-hire transportation of general commodities within the States of Alabama, Georgia, Mississippi, North Carolina and Tennessee" (J.A. 10). No state agencies or state officials were named as defendants and the government did not seek to enjoin any state regulatory functions.[3]

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rates is limited to interstate transportation, that is, movement across state lines (49 U.S.C. 10521). Interstate rate practices are not at issue in this case.

[3] The district court allowed petitioner National Association of Regulatory Utility Commissioners (NARUC) to intervene as a defendant to represent the general interests of the regulatory commissions of the five subject states. In addition, the attorneys general of the five states were invited to participate

In March 1979, the district court granted the motion of the United States for summary judgment (Pet. App. 1a-30a). The district court rejected petitioners' contention that the activities of the rate bureaus were immune from the antitrust laws under the "state action" doctrine articulated by this Court in *Parker* v. *Brown*, 317 U.S. 341 (1943). Pet. App. 11a-24a. The court acknowledged that motor common carriers operating within the five states in which these rate bureaus engaged in collective ratemaking are subject to regulation by state commissions. The carriers are required by law to obtain certificates of public convenience and necessity from the regulatory commission of the state within which they operate, and the carriers' rates are subject to state approval. All five states follow a similar pattern in regulating motor carrier rates: carriers must file their intrastate rates and proposed rate changes with the appropriate state commission; proposed rates take effect unless the commission sets them for hearing; if a hearing is ordered, then the rates take effect only after they are approved or modified by the commission. See Pet. App. 3a-9a, 64a n.1.

The district court held, however, that under this Court's decisions in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), state action immunity does not extend to private conduct unless it is compelled by the state. Pet. App. 15a-21a. The court found that none of the states requires collective ratemaking by intrastate motor carriers; carriers' rate proposals need not "be formulated or published by

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as amici curiae, which they did in the district court. Only North Carolina continued to participate in the court of appeals and in this Court. See Pet. App. 32a n.2.

rate conferences" (*id.* at 11a). Indeed, the district court noted, "it is conceded by all sides that the practice of joint rate publication is not expressly required by any statute, regulation or other legislative or administrative command of any of the subject states" (*id.* at 21a).[4] Because "the practice [of fixing rates by private agreement] is nowhere compelled" (*ibid.*), the district court concluded that the restraint on competition resulting from the rate bureaus' collusive setting of proposed rates is attributable to private conduct rather than state action and therefore is not immune from the antitrust laws.

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[4] At the time this suit was filed, there was no mention of rate bureaus or rate agreements among intrastate carriers in any statute in any of the five states, although the state regulatory commissions apparently acquiesced in the practice. In 1977, North Carolina enacted a statute permitting certain state-approved collective ratemaking procedures. The North Carolina statute provides that any carrier subject to the state commission's jurisdiction may submit "an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances or charges" to the state public utility commission for approval and provides that agreements so approved are exempt from the state's antitrust laws. N.C. Gen. Stat. § 62-152.1(b) (1982). No such agreements are required to be submitted, and no agreement is to be approved unless the commission "finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action after any determination arrived at through such procedure." *Id.* § 62.152.1(e).

The Georgia and Tennessee statutes have been amended since the district court's decision and now include provisions referring to collective ratemaking. See Tenn. Code Ann. § 65-15-119 (1983); Ga. Code Ann. § 46-7-18 (1982). Petitioners do not argue that these revised statutes compel collective ratemaking. Neither Alabama nor Mississippi currently has any statute dealing with rate bureaus.

The district court also rejected (Pet. App. 24a-26a) petitioners' contention that their conduct was immunized by the *Noerr-Pennington* doctrine, which immunizes private concerted action aimed at influencing public officials to take potentially anticompetitive action.[5] The court reasoned that the conduct at issue "surpasses mere petitioning and renders the industry in part, a decisionmaker" (Pet. App. 26a).

After rejecting petitioners' defenses to the government's Sherman Act claim, the district court held that the collective intrastate rate agreements among petitioners' member carriers constituted per se violations of Section 1 of the Sherman Act. Pet. App. 26a-29a. In reaching this conclusion, the court rejected, on the basis of *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945), the argument that petitioners only proposed—and the state commissions actually fixed—intrastate trucking rates. The court ruled that petitioners' conduct "easily fits the classic description of a 'naked price restraint'" (Pet. App. 28a). The court concluded that petitioners, by displacing competition with concerted pricing decisions within the "zone of reasonableness" allowed by the state regulatory agencies, had plainly violated the Sherman Act "at its most sensitive spot" (*ibid.*).

The court enjoined the rate bureaus from entering into or maintaining any conspiracy to fix collective intrastate rates[6] or providing a forum for any

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[5] See *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). See also *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972).

[6] The decree expressly does not prohibit carriers who are parties to a joint rate—"a single rate applied jointly by two

discussion of collective rates. J.A. 96-97. The final judgment, however, expressly permits the rate bureaus to continue to act as agents for intrastate carriers by publishing, in a single tariff if desired, rates independently arrived at by each competing carrier. J.A. 98. In addition, each rate bureau is permitted to provide statistical data and advice—including justifications for an individual carrier's rates filed with a state agency—to any carrier wishing to avail itself of the rate bureaus' expertise in the compilation and publication of tariffs. J.A. 99.

2. First a panel of the court of appeals (Pet. App. 31a-60a) and then the court of appeals sitting en banc affirmed (*id.* at 63a-93a). The court of appeals rejected petitioners' contentions that their conduct was immune from the antitrust laws under the state action doctrine. The court reasoned that *Parker* v. *Brown*, *supra*, "established the state action issue as a question of whether the challenged acts could be attributed to the state as sovereign" (Pet. App. 66a). The anticompetitive action of a private party is fairly attributable to the state only if the activity is required or compelled by the state acting as sovereign. *Id.* at 66a-69a. The court explained (*id.* at 69a; footnote omitted):

> [W]hen a state compels the private party to act, it deprives him of his freedom of choice; his action, being mere obedience, cannot be described as individual action and must therefore be attributed to the state.

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carriers to cover a shipment in which one carrier operates over only part of the route and the other carrier serves the remaining distance to the destination" (Pet. App. 42a n.11)—from agreeing on that rate.

On the other hand, if a state has not compelled private parties to engage in anticompetitive conduct, but rather has afforded those parties the option of competing or colluding, then their anticompetitive conduct is the product of private volition and thus it is not exempt as state action from federal antitrust laws (*id. at* 69a-70a).

The court of appeals found that this distinction is consistent with the federalism concerns that served as the basis for *Parker* v. *Brown*, *supra*. When "a private party is permitted by the state to make the choice whether or not to compete, there is no necessary conflict between state and federal law because the private party may comply with both federal and state law at the same time" (Pet. App. 70a n.9). Finally, the court pointed out that this Court has consistently ruled that "state authorization, approval, encouragement, or participation in restrictive private conduct does not confer antitrust immunity" and that there is no significant distinction between such state activity and the situation presented here in which "a state grants private parties the option of participating in a scheme of state supervision" (*id.* at 77a). Applying the compulsion standard, the court of appeals "ha[d] little difficulty in holding that the activities of appellants are not immune from Sherman Act coverage * * * because this litigation was brought against private defendants and none of the states in question compels the ratemaking bureaus to set rates collectively" (*id.* at 71a).[7]

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[7] Emphasizing that its holding applied only to the conduct of private parties, the court noted that under *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982), and *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), compulsion is not required when public

The court of appeals also rejected petitioners' contention that the *Noerr-Pennington* doctrine immunized their collective ratemaking agreements. The court endorsed the district court's explanation that the " 'coordinating and fixing of rates' " is a prohibited anticompetitive activity quite distinct from " 'presenting the collectively set rates to the state commissions' "; only the latter activity is arguably protected by the *Noerr-Pennington* doctrine. Pet. App. 43a-45a, quoting *id.* at 25a; see *id.* at 80a.

Finally, the court of appeals affirmed the district court's holdings that petitioners had violated the Sherman Act and that the Interstate Commerce Act created no implied immunity for petitioners' conduct. See *id.* at 40a, 45a-51a, 80a & n.20.[8]

SUMMARY OF ARGUMENT

I.

The state action doctrine in antitrust law that this Court articulated in *Parker* v. *Brown*, 317 U.S. 341 (1943), and subsequent cases rests on dual principles

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defendants, rather than private parties, seek to invoke the state action exemption. Rather, if a subordinate unit of government is carrying out a clearly articulated state policy, that governmental unit is acting as the agent of the state and the state action defense is available to it. Pet. App. 70a-71a.

[8] Four judges dissented. Judge Hill, in the principal dissent, acknowledged that the majority's "conclusion that compulsion is an essential element of the immunity for a private defendant certainly is plausible." Pet. App. 81a. But he argued that language in this Court's opinion in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), required the court to extend state action immunity to any private party acting consistently with a clearly articulated state policy the implementation of which is actively supervised by the state. Pet. App. 81a, 83a.

of federalism: the Sherman Act's proscription of anticompetitive conduct is the supreme law of the land, but Congress could not have intended through its silence in the Sherman Act to prohibit action of a state that may restrain competition. Thus, the *Parker* immunity, like all implied exemptions to the antitrust laws, has always been strictly limited. The Court pointed out in *Parker* itself that nothing in the Sherman Act indicated that states had any power to immunize private conduct from the federal antitrust laws simply by encouraging or approving it. 317 U.S. at 351. Petitioners' contention that the rate bureaus' actions nevertheless should be immunized because they further an articulated policy of the states and are supervised by the states' regulatory commissions is flatly inconsistent with clear holdings of this Court, and distorts the federalism principles that support the state action doctrine.

A.

Recognizing the limitation of the *Parker* doctrine to restraints attributable to governmental action by the states rather than private action, this Court has twice expressly rejected similar claims by private parties that mere state approval or encouragement of their conduct should immunize them from the Sherman Act. In both cases, the Court, without dissent on the issue, required that at a minimum the private defendants must demonstrate that their anticompetitive actions were compelled by the state. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976).

B.

The compulsion requirement faithfully serves the federalism principles underlying the state action doc-

trine. It recognizes that in particular instances the state may compel private persons to act anticompetitively, pursuant to a state policy to displace competition with regulation, and thereby make the private conduct fairly attributable to the state. The compulsion requirement also assures that federal law, which strongly favors competition, gives way to state regulation only when there is a real conflict with state law. If the state leaves the decision whether to compete to the private parties, then they can comply with both state and federal law and accordingly they must comply with the Sherman Act. *Cantor* v. *Detroit Edison Co.*, *supra*. To hold otherwise would be fundamentally inconsistent with this Court's holdings that implied exemptions to the antitrust laws are to be construed narrowly and are permitted only to the minimum extent necessary.

C.

Although this Court's state action decisions and the federalism policy that underlies them unquestionably support the holdings below that petitioners' volitional price-fixing agreements are not immune from the Sherman Act, petitioners nevertheless assert that the Court more recently has modified those holdings and principles sub silentio in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). But in *Midcal*, this Court relied upon *Goldfarb* and *Cantor* in invalidating a state statute that required resale price maintenance, but did not make any provision for the state to prescribe or even review the prices set by private parties. Thus, the Court's analysis gave no indication that it intended to depart from its prior holdings. There is similarly no inconsistency between the requirement of state com-

pulsion as a prerequisite for immunizing private conduct and the principle established by this Court in *Lafayette* and *Boulder* that municipalities, which themselves engage in governmental conduct, are entitled to immunity in the exercise of discretionary authority delegated to them by the states to implement clearly articulated state policies.

D.

Petitioners also argue that the compulsion requirement should be rejected because it unduly confines the states' discretion to achieve their regulatory objectives. But this contention amounts to nothing more than asking this Court to disregard the appropriate limits of the state action doctrine and the Supremacy Clause. *Parker* v. *Brown*, *supra*, and its progeny protect state action, not state policy. States retain the power to displace competition among motor carriers only if the states compel the carriers to set rates collectively. Otherwise, petitioners' private price-fixing is properly subject to federal law embodied in the Sherman Act.

E.

The express immunity afforded to certain types of interstate rate agreements by the Interstate Commerce Act—an immunity which has been largely eliminated and carefully circumscribed by recent legislation—does not support petitioners' argument that intrastate rate agreements constitute state action or are otherwise immune from the antitrust laws. Cf. *National Gerimedical Hospital* v. *Blue Cross*, 452 U.S. 378 (1981).

II.

Petitioners' collective ratemaking is not immunized by the *Noerr-Pennington* doctrine. The *Noerr* doctrine reflects this Court's conclusion that Congress did not intend the antitrust laws to apply to attempts by private parties to obtain governmental action that might restrain competition. But the action at issue in this case is not an attempt by the motor carriers to obtain a *governmental* restraint. Rather, it is private price-fixing that directly restrains competition. Merely because the collectively agreed-upon rates must be submitted to state regulatory officials for review and approval under a reasonableness standard before they can go into effect does not immunize petitioners' antecedent naked price restraint. See *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945).

ARGUMENT

I. COLLECTIVE RATEMAKING BY PRIVATE PERSONS THAT IS NOT COMPELLED BY THE STATE IS NOT "STATE ACTION" AND THEREFORE IS NOT EXEMPT FROM THE SHERMAN ACT

Section 1 of the Sherman Act was intended to prohibit broadly private restraints on competition (21 Cong. Rec. 2456, 2461 (1890) (remarks of Sen. Sherman)) and it is well-settled that the Act strongly condemns the type of naked price restraint embodied in the collective ratemaking process practiced by rate bureaus. See, *e.g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 214 (1940); *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 458 (1945). Petitioners do not, nor could they, argue that there is any express exemption in the Sherman Act or elsewhere that immunizes their private efforts to set prices collectively on intrastate transpor-

tation. Instead, they argue that the injunction against their price-fixing activities should be set aside because their private agreements concerning what rates to propose collectively should be considered "state action" within the meaning of this Court's decision in *Parker* v. *Brown*, 317 U.S. 341 (1943). They claim that because the states authorize the filing of collective rates and review those rates for their reasonableness, the collective rates agreements themselves are entitled to state action immunity. This contention finds no support in any decision of this Court, would extend the state action immunity much further than is necessary to protect those interests of the states that justify the immunity, and is not supported by any other policies that can be served consistently with the Sherman Act.

A. This Court Consistently Has Held That Private Persons Engage In State Action Only If Their Conduct Is Compelled By The State

In *Parker* v. *Brown*, 317 U.S. at 351, the Court held that Congress did not intend to prohibit "state action or official action directed by a state." See *Hoover* v. *Ronwin*, No. 82-1474 (May 14, 1984), slip op. 14 n.24. Although nothing in the Sherman Act itself or its history expressly indicates that states are exempt from its prohibitions, the Court observed that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351. Thus, the Court made plain that the "state action" doctrine rests entirely on principles of federalism. Based on those principles, the Court held that

the state-adopted and state-enforced raisin marketing program at issue in that case could not be enjoined as a violation of the Sherman Act because the program was "an act of government which the Sherman Act did not undertake to prohibit." 317 U.S. at 352. See *Olsen* v. *Smith*, 195 U.S. 332, 344-345 (1904).

But even as it recognized this immunity for the states, the Court in *Parker* was careful to emphasize that concomitant principles of federalism limit the scope of the immunity to restraints imposed by the states and their agents. The states do not have the power to shield privately imposed restraints of trade from the Sherman Act: "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker*, 317 U.S. at 351. See *Northern Securities Co.* v. *United States*, 193 U.S. 197, 346 (1904); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 592-593 (1976).

In none of the cases since *Parker* v. *Brown*, *supra*, in which this Court has applied the state action doctrine has the Court held or even suggested that discretionary conduct by private persons could be deemed state action for Sherman Act purposes. To the contrary, in the only two cases in which the Court directly considered whether private conduct should be immunized because of state involvement, the Court held that the absence of compulsion by the state was fatal to the parties' claim that their private activity should be deemed action by the sovereign.[9]

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[9] An analogous, although not identical, "state action" issue arises under the Fourteenth Amendment. In that context, this Court has held that "a State is responsible for the * * * act of

In *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 790 (1975) (emphasis added), the Court unanimously held that when a private party seeks to invoke the state action exemption, "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity *is required by the State* acting as sovereign." Because the State of Virginia did not require a minimum fee schedule for attorneys, the Court held that the promulgation and use of such a fee schedule by associations of private attorneys was not immune from challenge under the antitrust laws. *Id.* at 790-792. The Court explicitly rejected the defendants' argument that they could invoke the state action exemption because their activities "complemented the objective" of the state or were "prompted" by state action. The Court firmly stated that this was "not enough." *Id.* at 791.

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a private party when the State, by its law, has *compelled* the act." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 170 (1970) (emphasis added). There too the Court has refused to hold "that a State's mere acquiescence in a private action converts that action into that of the State." *Flagg Bros.* v. *Brooks*, 436 U.S. 149, 164 (1978). Indeed, even active involvement by the states—"approval by a state utility commission"—has not been deemed sufficient to convert private action into state action "where the commission has not put its own weight on the side of the proposed practice *by ordering it* * * *." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974) (emphasis added). See *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-1005 (1982); *Rendall-Baker* v. *Kohn*, 457 U.S. 830, 840 (1982). State action under the Sherman Act is an even narrower concept than state action under the Fourteenth Amendment because this Court has repeatedly held that exceptions to the Sherman Act, particularly implied exemptions, must be narrowly confined. See pages 19-20, *infra*.

"[A]nticompetitive activities must be *compelled* by direction of the State acting as a sovereign" in order for private defendants to claim state action immunity. *Ibid.* (emphasis added).

In *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), a case that is similar to this one, the Court reiterated this holding. *Id.* at 593 n.28. In *Cantor*, the Court held that an electric utility's program of tying the purchase of light bulbs to the purchase of electricity was not protected state action even though the state public utility commission authorized the practice and approved it as part of the utility's rates. Each of the opinions in *Cantor* specifically noted, and endorsed, the "carefully drafted language in the *Goldfarb* opinion" (*id.* at 624 (Stewart, J.)), holding that a private party's anticompetitive conduct does not fall within the state action exemption unless the state compels it. See *id.* at 600 & n.41 (plurality opinion); *id.* at 604 (Burger, C.J., concurring); *id.* at 609 (Blackmun, J., concurring); *id.* at 623-626 (Stewart, J., dissenting). Anything short of compulsion, the Court explained, is not sufficient to warrant applying the state action exemption to private conduct: "[t]he Court has already decided that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." *Id.* at 592-593 (footnotes omitted). A private party is not entitled to state action immunity from the antitrust laws, the Court held, if "notwithstanding the state participation in the decision, the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision." *Id.* at 593. Since the private utility defendant in *Cantor*—and not the state—made the decision

to institute the challenged conduct, this Court held that the privately imposed restraint at issue was not shielded by the state action exemption. *Id.* at 592-598. The Court specifically held that approval by the state's regulatory agency of the challenged conduct as part of its review of the utility's rates did not suffice to bring that conduct within the state action immunity. *Id.* at 594.[16]

B. Requiring Compulsion By The State To Convert Purely Private Action Into State Action Properly Reflects The Federalism Interest Embodied In The State Action Doctrine

1. The compulsion requirement for converting purely private action into exempt state action follows directly from the federalism rationale of the exemption articulated in *Parker* v. *Brown*, *supra*. Because the Sherman Act was intended broadly to prohibit restraints of trade imposed by "individuals and corporations," *Parker*, 317 U.S. at 351, private conduct should be protected from the pro-competitive policies of the Sherman Act if, and only if, "the challenged acts could be attributed to the state as sovereign" (Pet. App. 66a). In the situation where a private restraint is compelled by the state, the private party's action is fairly viewed as mere obedience to the *state's* decision to displace competition. But where,

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[16] This Court has further held that state compulsion of private anticompetitive conduct is not itself valid under the Supremacy Clause, unless it is part of a regulatory program under which the state directly supervises private conduct. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Otherwise, the states would be enabled simply to countermand the requirements of the Sherman Act at will, and thereby effectuate pro tanto repeals of the federal statute.

as here, private conduct is not compelled by the state —if it is merely allowed—the state has not made the decision to displace competition; it has left it to private parties to decide whether or not they will conform their conduct to the federal antitrust laws. Since, in such situations, the regulated private persons can comply with both the federal antitrust laws and state regulatory laws, there is no real conflict between state and federal law and applying federal antitrust law cannot frustrate the implementation of the state regulatory scheme. See *Cantor*, 428 U.S. at 595. Cf. *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 463 (1969).

The same conclusion follows from application to the private conduct at issue of the principle, often reiterated by this Court, that implied exemptions to the antitrust laws are disfavored and must be narrowly confined to the minimum necessary to make a particular statutory program work. See *National Gerimedical Hospital* v. *Blue Cross*, 452 U.S. 378, 388-389 (1981), and cases there cited. The Court held in *Cantor*, 428 U.S. at 597, that this principle fully applies to claims of exemption based on state regulation, since the standards for exemption to be applied to state regulation "surely must be at least as severe as those applied to federal regulatory legislation." The scope of the implied antitrust exemption for private conduct that follows from *Parker*, therefore, is limited by the purpose of the *Parker* doctrine itself, which is to enable the states to displace competition with programs of governmental regulation. Accordingly, exemption is warranted when the state regulatory program *requires* private persons' conduct to deviate from Sherman Act

norms.[11] But where the state program merely gives private persons an option to engage in behavior inconsistent with the Sherman Act, noncompliance with those norms cannot be said to be necessary to make the state regulatory program work, since the state program can be satisfied by private conduct within those norms. Hence, private conduct that is discretionary under the state program cannot satisfy the established standard for an implied antitrust exemption.[12]

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[11] Under the Supremacy Clause, of course, the states are not empowered to enact express exemptions to the Sherman Act. Consequently, no matter how explicitly the state authorizes, or even commands, private conduct inconsistent with Sherman Act norms, the question whether the resulting private conduct violates the federal statute remains a question of implied exemption. Thus, there could be no applicability here of the view urged in dissent in *Boulder* that the validity of the municipal conduct there at issue should have been judged under preemption rather than exemption standards. See 455 U.S. at 61-69 (Rehnquist, J., dissenting). Similarly, the question whether there is an implied exemption from damages liability for private conduct compelled by the state is distinct from the question whether the state law compelling that conduct is preempted. See *Midcal*, 445 U.S. at 114 n.16.

[12] This conclusion comports as well with the general proposition, reflected in this Court's Tenth Amendment decisions, that it is not the proper role of the states in our federal system to confer on private persons options that are denied them by federal law, and thus to countermand Congress's exercise of its legislative authority to regulate the conduct of persons directly. Hence, the *Parker* doctrine resembles this Court's description in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 286 (1981), of its Tenth Amendment jurisprudence as reflecting a

> sharp distinction between congressional regulation of private persons and businesses "necessarily subject to the dual sovereignty of the government of the Nation and of

2. Applying these principles to this case clearly requires affirmance of the decision of the court of appeals. Petitioners do not contend that any state compelled the challenged anticompetitive price agreements; they concede (SMCRC Br. 5) that the states give carriers the option of engaging in such conduct or of setting their rates independently. Thus, the decision in favor of what amounts to private price fixing was not made by the states in the exercise of their sovereign powers; it was made by the carriers, and the fact that a state authorized and approved that choice is, as the Court has repeatedly emphasized, not sufficient to confer state action immunity.[13] Within the state regulatory regime, motor carriers can engage in either collusive conduct—rate agreements like those challenged here—or competitive conduct—the submission of individual tariffs. In this area, state law has given carriers the option to choose between competition and collusion. This is precisely what state law does in areas it leaves unregulated.

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the State in which they reside," [*National League of Cities* v. *Usery*, 426 U.S. 833, 845 (1976)], and federal regulation "directed, not to private citizens, but to the States as States," *ibid.*

[13] Petitioners are incorrect in insisting (see SMCRC Br. 35; NCMCA Br. 16-17) that the relationship between the private parties and the state in this case resembles that in *Parker*. In *Parker*, the state decided to impose an anticompetitive regime; that it made this decision at the behest of private parties was not considered material. Here, the state regulatory regimes permit carriers to propose rates in either a competitive or a collusive fashion, and the carriers chose to collude. Collusion was not imposed on them by the states. See Pet. App. 67a-68a n.6. Hence, the very distinction drawn by this Court in *Cantor* (428 U.S. at 594 n.32) between that case and *Parker* applies equally here.

And when the state gives regulated private parties the choice between competition and collusion, just as when it leaves them unregulated, the Sherman Act requires private parties to choose competition.[14]

C. The Compulsion Requirement For Private Conduct Adopted In *Goldfarb* And *Cantor* Was Not Altered In *Midcal* And Is Fully Consistent With The "State Contemplation" Standard Applied To Municipalities In *City of Boulder* And *City of Lafayette*

1. Petitioners acknowledge (SMCRC Br. 14-16; NCMCA 17) that this Court in *Goldfarb* and *Cantor* expressly held that private action is protected state action only when the state compels it. Nevertheless, they contend that these holdings were subsequently modified by the Court in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

Midcal was a suit seeking to enjoin enforcement of a state statute that mandated resale price maintenance by private liquor wholesalers. Although private conduct was not challenged in *Midcal*, state compulsion was in fact clearly present in *Midcal* as to the private parties who were required to comply with

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[14] Both courts below concluded that, in the absence of state action immunity, the rate agreements are price-fixing agreements that are per se violations of Section 1 of the Sherman Act. See pages 6, 9, *supra*. Although petitioner SMCRC appears now to suggest (SMCRC Br. 12 n.25) that a rule of reason analysis is required if the agreements are not immune, that question was not presented in the petition for certiorari and accordingly is not before this Court. To the extent petitioners' argument that their agreements must be judged under the rule of reason is based on the information gathering and tariff publication functions performed by the rate bureaus, we emphasize that only the agreements on rates were challenged and enjoined in this case.

the statute.[15] In that context, the Court's statement that a state-imposed restraint on competition falls within the state action exemption only if it is " 'clearly articulated and affirmatively expressed as state policy' [and] * * * the policy [is] * * * 'actively supervised' by the State itself," *id.* at 105, quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (Brennan, J.), indicated no change in the standard for determining whether private conduct is shielded by the state action defense.[16] The Court held only that the state failed adequately to supervise the prices set by private entities, and, therefore, did not " 'displace unfettered business freedom' with its own power," 445 U.S. at 106 n.9, quoting *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978). Accordingly, the state statutory scheme in question was invalid.[17]

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[15] See *Rice* v. *Norman Williams Co.*, 458 U.S. 654, 659 (1982) (*Midcal* involved a "statute [that facially] conflicted with the Sherman Act because it *mandated* resale price maintenance" (emphasis in original)).

[16] In *Boulder*, 455 U.S. at 51 n.14, the Court specifically noted that the "clearly articulated policy" standard of *Midcal* and *Lafayette* applied to "anticompetitive restraints engaged in by state municipalities or subdivisions," while reserving the question whether a municipal ordinance such as the one at issue in *Boulder* "must * * * satisfy the 'active state supervision' test focused upon in *Midcal*."

[17] Petitioners emphasize (SMCRC Br. 19) this Court's characterization of the conduct at issue in *Midcal* as " 'essentially a private price fixing arrangement.' " The essentially private nature of the restraint resulted not from any absence of compulsion to engage in price fixing but, instead, from the state's failure to supervise the private parties, who retained the discretion to set the prices. Thus, the Court underscored the importance to the state action doctrine of assuring that the state or its agents, and not private parties, exercise complete control over any restraint on competition.

Nothing in this Court's *Midcal* opinion even hints that the Court was involved in a reassessment of the standards in *Goldfarb* or *Cantor*. To the contrary, the Court in *Midcal* specifically quoted from and relied upon those decisions. Quoting *Goldfarb*, 421 U.S. at 791, the Court emphasized that "[i]t is not enough that * * * anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." 445 U.S. at 104.[18] Moreover, the court of appeals' response to this contention is surely correct; "reading a compulsion requirement out of the private party state action doctrine would require a complete reformulation of the theoretical foundations for state action first established in *Parker*," and nothing in the Court's opinion in *Midcal* suggested that the Court intended to do any such thing. There is thus simply no basis for concluding that the compulsion standard unanimously endorsed by the Court in *Goldfarb* and *Cantor* was overruled sub silentio in a case decided four years later, on a different ground.[19]

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[18] The Court in *Midcal* also expressly relied on *Goldfarb* and *Cantor*, among other decisions, as "establish[ing]" the appropriate standard (445 U.S. at 105). Thus, both the holding and the language of *Midcal* merely apply, and are entirely consistent with, the principle this Court had previously established: "[A] state law [that] goes so far as to require, rather than simply authorize, the [private] anticompetitive conduct in question" is "a prerequisite to antitrust immunity * * * but it cannot alone be sufficient." *Cantor*, 428 U.S. at 609 (Blackmun, J., concurring). See also note 10, *supra*.

[19] Petitioner SMCRC argues (Br. 23) that the Court last Term in *Hoover* v. *Ronwin*, No. 82-1474 (May 14, 1984), held that private conduct can be state action if the private person acts pursuant to state policy and the action is supervised by the state. But *Hoover* involved conduct of the state supreme court

2. This Court has made plain that the "clearly articulated state policy to displace competition" standard applies, as a standard distinct from "compulsion," only to conduct of municipalities and other state instrumentalities.[20] See *City of Lafayette* v. *Louisiana Power & Light Co.*, *supra*; and *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 51 (1982). The Court's holdings reflect the special status of these governmental units in our federal system and thus have no application to this case, which concerns only private conduct. (We discuss this issue in our brief amicus curiae filed in *Town of Hallie* v. *City of Eau Claire*, No. 82-1832. A copy of that brief is being served on petitioners.)

Although subordinate units of state government are not themselves "the State as sovereign," and "for purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign," *City of Lafayette*, 435 U.S. at 410 (Brennan, J.); *City of Boulder*, 455 U.S. at 53-54, cities do engage in governmental action and are for many purposes the state's representatives.

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and its committee on examinations and admissions, rather than private conduct. Moreover, the Court in *Hoover* held that the challenged action was that of the state supreme court, which is clearly state action, and therefore it expressly stated that it "need not address the issues of 'clear articulation' and 'active supervision'" (slip op. 9). Thus, nothing in *Hoover* casts any doubt on the Court's earlier holdings in *Goldfarb* and *Cantor* that only compelled private action can be state action.

[20] To the extent the "clearly articulated policy" and "compulsion" standards have been used with reference to private conduct, they have been used interchangeably or tend to meld because, as we have shown, discretionary private conduct cannot qualify for *Parker* immunity.

When a state decides to displace competition with a system of regulation designed to protect the public welfare, the legislature often, for practical reasons, must delegate authority to subordinate agencies to carry out state policy. Moreover, effective implementation of state policy often requires the states to give subordinate governmental units some discretion in implementing state policies that have been expressed in relatively general terms or that depend on the agency's expert analyses of particular circumstances. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. at 413 (plurality opinion); *Community Communications Co.* v. *City of Boulder*, 455 U.S. at 51.

If the authority granted indicates that the legislature contemplated the conduct at issue, then it can be presumed that the legislature has determined that an exercise of the agency's discretion to take that action will further the interests of the state as a whole. Accordingly, subordinate agency action within the range contemplated by the legislature is official action implementing the state's policy. Subjecting discretionary state agency conduct contemplated by the state to the Sherman Act could seriously interfere with the state's ability " 'to allocate governmental power between itself and its political subdivisions' " (*Boulder*, 455 U.S. at 57, quoting *Lafayette*, 435 U.S. at 416) and thereby frustrate implementation of state policy.

In contrast to municipalities and other state agencies, private parties are not officers or agents of a state and by definition do not engage in governmental action.[21] Therefore, if a state purports to carry

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[21] This Court often has explicitly recognized the significance for purposes of the state action doctrine of the distinction

out state policy by delegating discretionary authority to private parties, it is not acting through its "agents" or "representatives," as petitioners contend. Rather, it has abdicated its right to displace competition with state governmental control. Application of the Sherman Act to private parties whose conduct is authorized but not compelled by the state thus does not "nullify a state's control over its officers and agents." *Parker*, 317 U.S. at 351. Rather it is required to implement Congress's intent that the Sherman Act be applied "to suppress combinations to restrain competition * * * by individuals and corporations." *Ibid.*[22]

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drawn in *Parker* between private parties and officers or agents of a state. See, *e.g.*, *Cantor*, 428 U.S. at 601 (Stevens, J.) ("*Parker* concerned only the legality of the conduct of the state officials"); *Bates*, 433 U.S. at 361 ("*Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency rather than against a private party"); *Lafayette*, 435 U.S. at 411 n.40 (Brennan, J.) ("*Cantor*'s analysis is not, however, necessarily applicable" to restraints imposed by a "State's subdivisions" because *Cantor* involved "anticompetitive activity in which purely private parties engaged.").

Similarly, in *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109-110 (1978), the Court held that the discretionary exercise of delegated authority by a subordinate state agency is not subject to the Sherman Act. But the Court expressly distinguished such action by the state's agents from private restraints authorized by the state such as that held to violate the Sherman Act in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951).

[22] Amicus Edison Electric Company argues (Br. 13) that the standards applied to municipalities should be extended to private persons in order to avoid creating "a serious competitive imbalance between municipal and private competitors." This contention disregards the whole point of the state action

D. Petitioners' Policy Arguments Do Not Justify Expanding The State Action Immunity

There is no reason for this Court to reconsider the compulsion requirement it adopted in *Goldfarb* and *Cantor* for private action. Petitioners' suggestion that, as a matter of public policy, the Sherman Act should not apply to the collective rate agreements at issue in this case, which the states have approved and perhaps even encouraged, does not, we submit, warrant expansion of the state action exemption. If the states conclude, as petitioners contend (SMCRC Br. 5), that motor carrier rate agreements are essential to the states' regulatory systems, the states may compel and supervise such agreements. If the states conclude that such agreements are sometimes, but not always, essential to implementation of state policy, they may compel and supervise such agreements only in particular circumstances that the states clearly designate or for particular categories of carriers. If the states, however, continue to choose not to compel motor carriers to act in a particular way, then the carriers' action will simply remain private action, not that of the states, and no substantial federalism interest will be implicated by the Sherman Act's application to petitioners' private price-fixing.

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doctrine. The states retain the right to displace competition as the basis for certain commercial activities when a state acts through its legislature or subordinate state agencies. If the test adopted in *City of Boulder* is satisfied, the state has displaced competition to that extent and thus has exercised its right to place private persons at a "competitive" disadvantage. But the state cannot, consistently with the Sherman Act, confer a similar discretionary authority on private persons to act in an anticompetitive manner inconsistent with Sherman Act norms.

Petitioners assert (NARUC Br. 9 n.12; NCMCA Br. 15) that requiring a state to compel anticompetitive private conduct in order to immunize it would be undesirable because such a rule could result in less competition, since some carriers now file individual rates. This argument ignores, however, the dual principles of federalism on which the state action doctrine rests: (i) supremacy of the federal antitrust laws as applied to privately imposed restraints, and (ii) latitude for the actions of the state and its agents. As the court of appeals explained, "it is the source of the decision to compete—not the extent of competition—which determines whether state action exists" (Pet. App. 79a). Congress did not intend to prohibit states' decisions to displace competition by their own actions, but it did intend to prohibit displacement of competition by private persons.

To the extent petitioners' arguments for state action immunity rest on the contention that efficiencies may result from collective activity other than agreements on single line rates, they are irrelevant.[23] The district court's final judgment prohibits the continuation of the defendant rate bureaus' ratefixing conspiracy, but it permits the rate bureaus to publish joint tariffs containing motor common carrier rates independently arrived at by each carrier (J.A. 93-102). In addition, the decree permits the rate bu-

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[23] As we noted previously, the district court expressly excluded the practice of setting joint rates on a single movement by more than one carrier (interlining) from the injunction. Unlike the horizontal rate agreements at issue here, interlining is a form of joint venture. Accordingly, the assertion by Amicus American Trucking Associations, Inc. (Br. 4) that the decision below will interfere with interlining is manifestly incorrect.

reaus to serve as rate experts for any carrier desiring their services to support an independent rate proposal before the appropriate regulatory agency.[24] In this manner the carriers—small as well as large—and state regulatory agencies[25] still may enjoy any benefits accruing from a single tariff publication and petitioners' statistical and analytical skills.

Alternatively, if petitioners are arguing that competition is undesirable because it is too difficult for carriers to decide on their prices individually or because less efficient carriers may be forced out of business, those arguments repeatedly have been rejected by the Court as contrary to the congressional policy of competition embodied in the Sherman Act. *E.g.*, *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-222 (1940). Indeed, they have largely been rejected with respect to rate bureaus themselves by Congress in the Motor Carrier Act of 1980. See pages 32-33, *infra*.

E. The Interstate Commerce Act Does Not Immunize Petitioners' Private Price Fixing Agreements

Petitioner NCMCA also contends as part of its state action submission (NCMCA Br. 13-16) that the Sherman Act should not be applied to state-regulated

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[24] A similar arrangement already has been adopted and successfully implemented in *United States* v. *Motor Carriers Tariff Bureau, Inc.*, Civ. Action No. 77-1973, Trade Cas. (CCH) ¶ 62,374 (D.D.C. Oct. 24, 1978) (R. 1476-1480; R. 2011-2015).

[25] The final judgment is directed solely at the rate bureaus' private activities and does not in any way prevent the state regulatory agencies from exercising the powers conferred on them by state law.

intrastate carriers' collective ratemaking because the Interstate Commerce Act provides an express and limited exemption for collective *interstate* ratemaking and authorizes the states to review certain intrastate rates. The courts below correctly held (Pet. App. 40a n.9, 80a n.20) that the Interstate Commerce Act creates no exemption, express or implied, for collective intrastate ratemaking, and it does not authorize the states to confer such immunity.[26]

Petitioners point to nothing in the Interstate Commerce Act suggesting that such an immunity exists, and indeed they do not directly challenge the lower courts' holding on this issue. They contend only that the state action doctrine should protect state-regulated intrastate conduct comparable to interstate conduct for which Congress has provided an express, albeit carefully tailored, antitrust exemption.

In the first place, the state action doctrine does not confer immunity on private conduct merely because Congress has expressly exempted analogous, but different, conduct. It is for Congress alone to decide what private conduct should be immune from the Sherman Act. The differences in the antitrust immunity available for interstate and intrastate ratemaking are simply the result of choices made by Congress, and the wisdom of those choices has no bearing on the issues presented for review in this case. Certainly, it provides a wholly inadequate basis for inferring an exception to the Sherman Act. See, *e.g.*, *National Gerimedical Hospital* v. *Blue Cross*, 452 U.S. 378, 388-389 (1981); *United States* v. *National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 719-

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[26] By contrast, the McCarran-Ferguson Act provides an express antitrust immunity for the "business of insurance" to the extent regulated by state law. 15 U.S.C. 1012.

720 (1975); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-351 (1963).

Moreover, the restrictions imposed by federal law on collective interstate ratemaking by rate bureaus are much more exacting than state regulation of intrastate practices and serve the same basic purpose as the district court's injunction. As of July 1, 1984, the Interstate Commerce Commission, with certain limited exceptions, may not confer antitrust immunity on any agreements among motor carriers that provide for discussion or voting by carriers on single line rates. 49 U.S.C. 10706(b)(3)(D).[27] In considering the 1980 Act, Congress explained that one of its primary aims was to develop "a legislative solution aimed at increasing competition" (H.R. Rep. 96-1069, 96th Cong., 2d Sess. 3 (1980)). The activities of rate bureaus constitute an extraordinary exception to

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[27] Under the Motor Carrier Act, motor carrier rate bureaus must comply with numerous statutory restrictions if they wish to maintain their antitrust immunity, and the ICC can void ab initio any tariff filed that is the product of a significant violation of the rate bureau's allowed procedures. *ICC* v. *American Trucking Ass'n*, No. 82-1643 (Jan. 5, 1984). Among other things, the statute requires disclosure of membership (49 U.S.C. 10706(b)(3)(A)); imposes limits on discussions of and actions on proposed rates (49 U.S.C. 10706(b)(3)(B)); guarantees the rights of bureau members to act independently (*ibid.*); and requires timely action on proposed rates (49 U.S.C. 10706(b)(3)(B)(vii)). More specifically, the Act restricts voting on collective proposals to those carriers that have authority to participate in the transportation to which the proposal applies; bars bureau protests of any motor carrier rate proposed by an individual carrier; limits discussion of general rate increases to industry average costs; imposes strict limits on bureau handling of independent action proposals; and requires completely open bureau meetings. 49 U.S.C. 10706(b)(3)(D).

the usual rules absolutely condemning collusive activities to set prices; the specific purpose of Section 14 (94 Stat. 803), was to limit severely the permissible scope of such collusive ratemaking by these bureaus (H.R. Rep. 96-1069, *supra*, at 3-4, 10, 27-29; S. Rep. 96-641, 96th Cong., 2d Sess. 13-14 (1980)).

II. THE *NOERR-PENNINGTON* DOCTRINE DOES NOT IMMUNIZE PETITIONERS' PRIVATE PRICE FIXING AGREEMENTS

The *Noerr-Pennington* doctrine[28] reflects this Court's conclusion that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Noerr*, 365 U.S. at 135. In other words, Congress did not intend the antitrust laws to apply to attempts, successful or not, by private parties to obtain governmental action that restrains competition. But the conduct at issue in this case is not an attempt to obtain a governmental restraint; it is a privately agreed-upon restraint—a classic price-fixing contract, combination, or conspiracy in restraint of trade. Its fundamental nature as a privately-imposed restraint is not changed merely because its results require governmental approval—or at least acquiescence—in order to take effect.

The Court distinguished in *Noerr* between combinations of private parties for the purpose of "persuad[ing] the legislature or the executive to take particular action with respect to a law that would

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[28] The *"Noerr-Pennington"* doctrine was developed in three cases: *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1971).

produce a restraint or a monopoly," which are not prohibited by the Sherman Act, and "combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom * * * through the use of such devices as price-fixing agreements," which do violate the Sherman Act. 365 U.S. at 136. *Noerr-Pennington* does not shield petitioners' collective rate agreements because they are the latter type of combination.

Thus, submission of collectively formulated rate proposals to a state agency in the context of statutory schemes based on carrier initiation of rates and rate increases through tariff filings is fundamentally different from petitioning a legislature or state agency affirmatively to exercise its policymaking powers. In any event, as the courts below recognized (Pet. App. 44a), even if the kind of petitioning that occurs when carriers seek state approval of their proposed rates were itself protected by *Noerr*, " 'the defendants' activities of collective rate formulation constitute independently cognizable acts outside the scope of First Amendment protection or the *Noerr-Pennington* doctrine.' " [29] If this were not so, then any group of competitors could agree to fix prices and then attempt to immunize their conduct by sub-

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[29] Petitioners' argument that agreement on prices is necessary to any presentation of proposed rates it without merit. Under the final judgment, the rate bureaus still may provide economic and statistical information that carriers may need to formulate rate proposals and may publish a compilation of individually determined rates. See page 7, *supra*. The argument that a business "needs" price fixing agreements with competitors in order reasonably to price its goods is one that the Sherman Act does not countenance. *National Society of Professional Engineers*, 435 U.S. at 696; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. at 220-222.

mitting a legislative proposal to their congressman authorizing the anticompetitive activity. *Noerr-Pennington* simply does not protect the antecedent illegality; it protects the act of petitioning itself.

Petitioners' argument to the contrary is foreclosed by this Court's holding in *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945),[30] that submission to a regulatory agency of collectively established rates does not immunize the collective ratemaking from the Sherman Act. It also is foreclosed by the holding in *Cantor* v. *Detroit Edison Co.*, *supra*, that a private utility's decision to institute anticompetitive conduct is not protected by *Noerr*, even though the private decision could be implemented only after a tariff was filed with and accepted by a state regulatory agency. 428 U.S. at 601-602 (Stevens, J.).[31]

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[30] See also the cases there cited and discussed, 324 U.S. at 456-458.

[31] See also *Litton Systems, Inc.* v. *American Telephone & Telegraph Co.*, 700 F.2d 785, 807 (2d Cir. 1983), cert. denied, No. 82-2128 (Jan. 16, 1984) ("a mere *incident* of regulation—the tariff filing requirement—is [not] tantamount to a request for governmental action akin to the conduct held protected in *Noerr* and *Pennington*"); *California* v. *FPC*, 369 U.S. 482, 488-489 (1962); *United States* v. *RCA*, 358 U.S. 334 (1959); *City of Kirkwood* v. *Union Electric Co.*, 671 F.2d 1173 (8th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); *City of Mishawaka* v. *American Electric Power Co.*, 616 F.2d 976, 981-983 (7th Cir. 1980), cert. denied, 449 U.S. 1096 (1981). As the court of appeals noted, this Court has never held that regulatory approval is sufficient to confer antitrust immunity, but instead has held to the contrary.

Moreover, immunizing rate agreements would thwart the principal objective of the *Noerr-Pennington* exemption—to protect the flow of information to public officials. See *Noerr*, 365 U.S. at 137. The collusive activities at issue here limit the

As we have shown (see page 21, *supra*), the restraint at issue in this case—a rate agreement among carriers—is attributable to petitioners' private decisions rather than to governmental action sought by petitioners. By approving the agreed-upon rates or even by approving the rate agreements themselves, the states do not create any restraints on competition; they merely allow private anticompetitive agreements and determine whether the rates set pursuant to those agreements are reasonable and otherwise in accord with state law. Thus, the motor carriers whose agreements are at issue here are not engaging in "mere attempts to influence the passage or enforcement of laws" (*Noerr*, 365 U.S. at 135) by the state as sovereign; they are acting to reduce competition by fixing prices among themselves.[32]

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flow of information by substituting a single proposal for the diversity of views and supporting evidence that regulators would otherwise receive.

[32] The *Noerr* doctrine, as the Court has emphasized, does not protect every restraint of trade that is related to lawful political activity or exercise of First Amendment rights. See 1 P. Areeda & D. Turner, *Antitrust Law*, § 205, at 51 (1978). Rather, that doctrine recognizes and incorporates the general principle that "First amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 514-515 (1971), citing *Giboney* v. *Empire Storage Co.*, 336 U.S. 490 (1949). Accordingly, the private agreements at issue here, which constitute per se violations of Section 1 of the Sherman Act, are not immune from that Act under *Noerr-Pennington*.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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